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No. 01-1061

IN THE

Supreme Court of the United States

PROGRAMMED LAND, INC., *et al.*,
Petitioners,

v.

PATRICK O'CONNOR, TREASURER AND AUDITOR,
HENNEPIN COUNTY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Minnesota

BRIEF OF *AMICUS CURIAE* TAX EXECUTIVES INSTITUTE, INC. IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICUS CURIAE* TAX EXECUTIVES INSTITUTE, INC. IN SUPPORT OF PETITIONERS

Pursuant to Rule 37 of the Rules of the Supreme Court, Tax Executives Institute, Inc. respectfully submits this brief as *amicus curiae* in support of Petitioners.[1] Tax Executives Institute (hereinafter "TEI" or "the Institute") is a voluntary, nonprofit association of corporate and other business executives, managers, and administrators who are responsible

[1] Pursuant to rule 37.6, *amicus* TEI states that no counsel for a party has authored this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Tax Executives Institute has received the written consents of the Petitioners and Respondents to the filing of this brief; those consents have been filed with the Clerk of the Court.

for the tax affairs of their employers. The Institute was organized in 1944 and currently has approximately 5,300 members who represent more than 2,700 of the leading businesses in the United States, Canada, and Europe, nearly all of which are engaged in interstate commerce.

The members of the Institute represent a cross-section of the business community in North America. The Institute is dedicated to promoting the uniform and equitable enforcement of the tax laws and to reducing the costs and burdens of administration and compliance to the benefit of both the government and taxpayers, and to vindicating the Commerce Clause, due process, and other constitutional rights of business taxpayers. As tax professionals who recognize the States' and local jurisdictions' rights to collect properly levied taxes and who respect the legitimacy of government tax assessments, our members have a significant interest in the standards applied in assessing the adequacy of remedies accorded taxpayers for unlawfully imposed and collected taxes.

This case raises fundamental questions about the remedies available for taxpayers who have paid excess taxes due to undisclosed miscalculations on the part of government officials. Viewed narrowly, the issue is whether the State of Minnesota improperly denied certain commercial real property owners due process, and therefore any meaningful relief, for property taxes overpaid in reliance on the correctness of tax bills prepared and sent by county officials of Hennepin and Dakota Counties. Viewed broadly, the issue is what obstacles may a state or local jurisdiction constitutionally erect to deny taxpayers a refund of illegally collected taxes.

The Institute's members and the businesses by which they are employed have a keen and vital interest in ensuring the efficacy and effectiveness of remedies provided to taxpayers who are subjected to unlawful taxation. Given the checkered

history of the States on refunding improperly collected taxes, this case promises to affect far more than Hennepin or Dakota County's authority to retain the taxes improperly exacted from the taxpayers. *Amicus* TEI is rightly concerned about the deleterious effect the Minnesota Supreme Court's decision could have on the equitable administration of other state and local taxing schemes relating to business taxpayers.

Because TEI members and the businesses by whom they are employed will be materially affected by the application of the Minnesota Supreme Court's decision, the Institute has a special interest in the outcome of this case.

SUMMARY OF ARGUMENT

1. The core issue in this case is whether taxpayers who have overpaid taxes in reliance on a government prepared and issued tax bill are entitled to refunds of the illegally extracted monies. Programmed Land, Inc. and the other petitioners (hereinafter "affected taxpayers") are property owners in the State of Minnesota who sought refunds of excess real property tax payments made in reliance on tax bills sent by county officials. It is undisputed that the affected taxpayers had no way to determine from the information included in the tax bills that the counties were overcharging them. Although they concede that they overbilled the affected taxpayers, Hennepin and Dakota Counties have steadfastly refused to refund the overpayments. The counties contend that the claims for refund are timed-barred because they were not brought within the time limit specified for assessment challenges in MINN. STAT. § 278.01 (1997).

2. An understanding of the real property tax assessment, notice, and billing cycle in Minnesota is necessary in order to assess the constitutional sufficiency of § 278.01 in this case. Each year an assessment notice is mailed to owners showing the assessed value and classification; if an owner disagrees, it must challenge the county's determin-ations by March 31st of the following year. The deadline for mailing the final tax bill

is same March 31st deadline for challenging the valuation or classification. Although some affected taxpayers received their final bill before the deadline to file a protest, in many cases the deadline had already passed.

3. It should be axiomatic in tax administration that improperly collected tax payments will be refunded. Such a principle squares with the American sense of fairness and enhances voluntary compliance. It is predicated on trust—on the notion that, if the government has done something wrong or if government officials perform their duties haphazardly or not at all—it will not be taxpayers who suffer. For many States, however, the "end" of collecting (and keeping) revenues has increasingly justified the "means" of depriving aggrieved taxpayers of the only true remedy—refunds. Taxpayers who in good faith had paid their taxes found themselves consigned to the role of Tantalus. Hungering and thirsting to be made whole, they reached for a refund from the bough of statutory procedure and past practice, only to have it blown out of reach by the State; belatedly told to stoop to drink relief, they discovered the possibility of a refund had long since drained away.

4. The last two decades have seen a disturbing number of state taxing statutes invalidated on constitutional grounds. Moreover, States have in many cases resisted efforts to provide refunds on grounds the taxpayer failed to abide by the affected State's procedural requirements. Reinterpreting procedural requirements to deny relief for a properly administered, albeit unconstitutional, tax is bad enough. The State of Minnesota here, however, goes even further—taxpayers who had no way of knowing they were billed incorrectly were subjected to procedural obstacles constructed to block their way to a refund of the excess tax payments. The pattern of misbehavior by state or local governments of

refusing to pay over funds properly belonging to taxpayers, whether due to the unconstitutionality of the tax or a hidden miscalculation, must be stopped.

5. When presented with more than 60 applications for overpayment refunds on the same day, Hennepin County decided that the overpayment statute which it had used earlier to permit refunds was no longer applicable; instead, it argued that the one-year statute of limitations in § 278.01 precluded the refunds. The Minnesota Supreme Court validated this result, finding a supposed constitutionally sufficient predeprivation remedy in the assessment protest process. This was in spite of the separate overpayment statute heretofore used to grant refunds and a longstanding Minnesota Supreme Court decision—*Wheeler v. Bd. of Comm'rs of Hennepin County*, 87 Minn. 243 (1902)—that has almost identical facts.

6. In holding that the only option for refund available was using the assessment protest statute to contest the legality of the taxes billed, the Minnesota Supreme Court disregarded two key factors. First, as the court itself acknowledged, there is no way a taxpayer could have known that the county applied an incorrect class rate from any information provided by the counties. Second, the deadline for initiating a claim under the assessment protest statute is March 31st, the same deadline for mailing out the tax bills. In other words, the Minnesota Supreme Court adopted a statute of limitations that will in almost all cases bar recovery even before the cause of action arises. This is the very antithesis of due process.

7. In *McKesson Corp v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 31 (1990), this Court stated that, to satisfy the requirements of due process, the State must provide an aggrieved taxpayer either with a predeprivation hearing or with "meaningful backward-looking relief." That relief, the Court said, must be "clear and certain." *Id.* at 39. On its face, Minnesota's statutory scheme comports with this

procedural requirement. This case is before the Court, however, because the court below vitiated that remedy, finding first that the overpayment statute was inapposite and further that Minnesota law provided a constitutionally sufficient predeprivation remedy, to wit: the assessment protest statute, which had never before been extended to cover the non-discretionary act of calculating tax bills.

8. Even assuming that the assessment protest procedure would accommodate the errors of county officials charged with administering Minnesota's property tax statutes, can such a patchwork satisfy the requirement that the taxpayer's remedy be "clear and certain" as required by *Reich v. Collins*, 513 U.S. 106 (1994)? In that case, the Court held that a State may not "reconfigure its scheme, in midcourse"—to "bait" taxpayers into believing that a refund remedy exists, only to "switch" later by claiming its inapplicability. Minnesota here endeavors to shoehorn the affected taxpayers into a refund scheme that, by its very terms, will deny them relief. The court below parsed Minnesota's property tax statutes and analyzed them, not in search of principle or justice, but a loophole. And it did so in the context of improper billing by government officials under circumstances that gave taxpayers no reasonable alternative.

9. This Court is properly loath to impinge on the state courts' prerogative to fashion remedies. But the States' remedial discretion is not unfettered, especially where that discretion has been repeatedly abused or where it is exercised to cloak harmful errors by local government officials. In the past two decades, State after State has distended this Court's holdings in order to eviscerate the protections accorded taxpayers by the Constitution. The States should not be permitted to thwart the judgments of this Court by creating one excuse after another for refusing to return to taxpayers what the States had no right to collect in the first instance. Unless the Court mandates meaningful relief—the immediate

refund of the unlawfully collected taxes—the States will continue to have an incentive to contort their statutes to deny relief for taxpayers deprived of their property.

10. It is time for this Court to say that enough is enough. It is time to reject the States' beguiling interpretations of state law, distended readings of the Constitution, and facile efforts to vitiate the Court's mandates. It is time to say, once again, that "[t]he time for toleration has come to an end." *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987). The Court should grant a writ of certiorari, reverse the decision of the Supreme Court of Minnesota, and order the counties to refund the taxes they unlawfully collected from the Petitioners.

ARGUMENT

I.

The core issue in this case is whether denying refunds to taxpayers who have overpaid *ad valorem* property taxes in reliance on government prepared and issued tax bills violates the Due Process Clause of the Constitution. U.S. CONST. amend. XIV, § 1. *Amicus* Tax Executives Institute respectfully submits that, in denying refunds to the petitioners in this case, the State of Minnesota's actions amount to an unconstitutional "bait and switch" of the type struck down by this Court in *Reich v. Collins*, 513 U.S. 106 (1994).

Programmed Land, Inc. and the other petitioners (hereinafter "affected taxpayers") are owners of commercial or industrial property in Hennepin or Dakota County in the State of Minnesota. The affected taxpayers sought refunds of excess real property tax payments made in reliance on the accuracy of tax bills sent to them by county officials from 1991 to 1996. The overpayments occurred because county taxing officials did not apply a favorable rate to the first $100,000 of assessed value of the affected taxpayers'

properties.[2] The material facts of the case are not in dispute: "The counties applied the wrong class rates to [the affected taxpayers'] class 3(a) property, and [the affected taxpayers], as a consequence, paid excess property taxes." App. at 7a.[3] The affected taxpayers had no way to determine from the information included in the tax bills that the counties were overcharging them. The Minnesota Supreme Court determined that notices provided by the counties "did not contain information from which [the affected taxpayers] could determine that the counties applied the wrong class rate."[4] App. at 7a.

Although they concede that they overbilled the affected taxpayers, Hennepin and Dakota Counties have steadfastly refused to refund property tax overpayments demanded from the affected taxpayers during the relevant tax periods. The counties contend that the claims for refund are timed-barred because they were not brought within the time limit specified for assessment challenges in MINN. STAT. § 278.01 (1997). The Minnesota Supreme Court agreed that because § 278.01

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[2] Minnesota law sets the general rate at 5.06 percent during the years at issue; the favorable rate on the first $100,000 of value for any one parcel in each county varied during this time, but was usually around 3 percent. App. at 3a.

[3] "App." references are to the various appendices bound with the Petition For a Writ of Certiorari, *Programmed Land, Inc.*, et al. *v. Patrick O'Connor, Treasurer and Auditor, Hennepin County,* et al., No. 01-1061 (filed Jan. 16, 2002).

[4] The assessed value of real property subject to tax within a county is multiplied by the appropriate class rates to determine a "net tax capacity" against which various taxing districts (*e.g.*, counties, utility districts, school districts, library boards) compare their budgets for the following year. The class rates are then proportionately extended as necessary to provide the required revenue to support the various taxing districts' budgets, and county auditors apply these rates in generating the tax bills. Neither the rate information nor the various extensions are reflected in the information received by taxpayers, *Id.* at 3-6.

provided a statutory procedure covering Petitioners' claims, common law and equitable remedies are unavailable. App. at 2a.

An understanding of the real property tax assessment, notice, and billing cycle in Minnesota is necessary in order to assess the constitutional sufficiency of MINN. STAT. § 278.01. Each year county assessors determine the assessed value of a parcel of real property and its classification (*e.g.*, residential, commercial, or industrial). An assessment notice is mailed to owners in February showing the assessed value and classification; no information regarding class rates is included in the notice. If an owner disagrees with the valuation or classification, it must challenge the county's determinations by March 31st of the following year. In November of the assessment year, before tax rates are finalized, an estimate of the tax that will be owed is mailed to the owner—no rate information is included, only a total amount—and hence the property owner has no information from which to determine that the county will misapply the rate when calculating the final bill. Under MINN. STAT. § 276.04 (1997), the deadline for mailing the final tax bill is March 31st of the following year, which is also the deadline for filing a timely protest under MINN. STAT. § 278.01. Again, no information on the rates is included with the final tax bill—only an amount due.[5] Regardless, although some affected taxpayers received their final bill before the deadline to file a protest, in many cases the deadline had already passed.

II.

It should be axiomatic in tax administration that improperly collected tax payments, whether due to constitutional infirmity of the tax itself or through an overpayment due to

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[5] MINN. STAT. § 274.09 (1997) requires county auditors to charge taxpayers "the proper amount of taxes," however, and taxpayers should be able to rely on the correctness of their bills.

government miscalculation, will be refunded to their rightful owners. Such a maxim clearly squares with the American sense of fairness, essentially restoring the aggrieved taxpayers to the position they would have occupied had the improper tax not been levied or excess amount billed. Equally important, it encourages taxpayers to pay first and seek redress, when appropriate, later. Hence, this concept is not only just in a philosophical sense, but provides governments a more stable funding source; conversely, an absence of fairness serves to undermine taxpayers' voluntary compliance with our tax systems. Our tax system is predicated on trust —on the notion that, if the government has done something found to be improper or if government officials perform their duties haphazardly or not at all, it will not be the compliant or even complaisant taxpayers who suffer.

Beginning in the 1980s, many fiscally constrained States sought financial gain and routinely breached this bedrock trust in the context of unconstitutional or illegally collected taxes. The "end" of collecting (and keeping) revenues seemed to justify the "means" of first imposing a discriminatory tax and then, upon its invalidation, depriving aggrieved taxpayers of the only true remedy—refunds—by engaging in the governmental equivalent of three-card monte. Trust was supplanted by cynicism. Taxpayers who in good faith had paid their taxes (in reliance on correct tax bills, refund statutes, longstanding judicial precedent, and the aforementioned principle of fair play) found themselves consigned to the role of Tantalus. Hungering and thirsting to be made whole, they reached for a refund from the bough of statutory procedure and past practice, only to have it blown out of reach by the State; belatedly told to stoop to drink relief, they discovered the possibility of a refund had long since drained away.

Is it any wonder that when state and local governments violate the rules of fair play, the people lose faith in the

governmental process and, indeed, in the worth of the rules themselves? Is it any wonder that, absent an explicit mandate that refunds be automatically paid when taxes have been imposed without authority, state and local jurisdictions continue to deprive deserving tax-payers of their tax refunds? Is it any wonder that a local jurisdiction that has overcharged unsuspecting taxpayers truculently refuses to make restitution? Regrettably, it is no wonder at all.

The last two decades have seen a disturbing number of state taxing statutes invalidated on constitutional grounds.[6] Moreover, even after the statutes were voided, some States resisted efforts to compel refunds of the taxes that they had collected under the invalidated laws—first on grounds that the substantive decision should be given prospective-only effect and then on grounds that the taxpayer had failed to abide by the affected State's procedural requirements. Reinterpreting procedural requirements to deny relief for a properly administered, albeit unconstitutional, tax is bad enough. The State of Minnesota here, however, goes even further—taxpayers who had no way of knowing they were

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[6] *See, e.g., Armco Inc. v. Hardesty*, 467 U.S. 638, 645-46 (1984) (West Virginia's business and occupation tax); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 273 (1984) (Hawaii's exemption of local products from the liquor excise tax); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 882-83 (1985) (Alabama's tax on foreign insurers); *Tyler Pipe Indus. v. Washington Dep't of Revenue*, 483 U.S. 232, 248 (1987) (Washington's business and occupation tax); *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266, 286-87 (1987) (Pennsylvania's highway use tax); *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 814-15 (1989) (Michigan's tax on federal retirees' pensions); *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 22 (Florida statute exempting local products from liquor excise tax); *Associated Indus. of Mo. v. Lohman*, 511 U.S. 641, 647-54 (1994) (Missouri's supplemental use tax); *Hunt-Wesson, Inc. v. Franchise Tax Bd.*, 528 U.S. 458, 468 (2000) (California's disallowance of expense deductions without allowing reasonable allocation).

billed incorrectly were subjected to procedural obstacles constructed to block their way to a refund of the excess tax payments. The pattern of misbehavior by state or local governments of refusing to pay over funds properly belonging to taxpayers, whether due to the unconstitutionality of the tax or a hidden miscalculation, must be stopped.

Over the years, the States' refusal to fashion meaningful remedies has been rationalized on equity grounds. Many States argued that the balancing test set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971), could be applied to safeguard the constitutional rights of taxpayers, while protecting the financial interests of the States.[7] Experience convinced this Court, however, that the *Chevron Oil* standard was too pliant, enabling too many States to construe it in a "heads I win, tails you lose" manner. Consequently, in *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993), this Court embraced the full retroactivity standard of *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987).[8] One year later, in *Reich*, the Court squarely addressed the issue of remedy, declaring that a State may not hold out what plainly appears to be a "clear and certain" post-deprivation remedy and subsequently declare, after taxpayers have paid the disputed tax, that the remedy is inapplicable to the case at hand. In *Newsweek, Inc. v. Florida Dep't of Revenue*, 522 U.S. 422

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[7] For the *Chevron Oil* balancing test, three separate factors were considered: First, whether the decision to be applied nonretroactively established a new principle of law; second, weighing the merits of the case and given the prior history, purpose, and effect of the rule in question, whether retrospective operation will further or retard its operation; and finally, whether the inequity imposed by retroactive application creates an injustice or hardship. 404 U.S. at 106-07.

[8] *Griffith* holds that new rules for the conduct of criminal prosecutions must apply retroactively to all pending or non-final cases, even if they constitute a "clear break" with the past. 479 U.S. at 328. *Harper* extends the rule to civil cases. 509 U.S. at 99.

(1998), the Court reiterated that while a State "may be free to require taxpayers to litigate first and pay later, due process prevents it from applying this requirement to taxpayers . . . who reasonably relied on the apparent availability of a postpayment refund when paying the tax." *Id.* at 444.

The instant case reprises the question of remedy—a question seemingly resolved by the Court's mandate in *Reich* that the States may not resort to "bait and switch" tactics. *Reich*, 513 U.S. at 111.[9] Here, Hennepin and Dakota County officials admittedly misapplied tax rates and overbilled the affected taxpayers. In contrast to a young child who, having filched some candy from the store, is made to return the candy or pay for it, the counties here defiantly refused to refund the money after the error in billing was discovered by more than a few affected taxpayers. Rather than doing what was right, the counties and the Minnesota Supreme Court engaged tax-payers in a game of remedy roulette in which they changed the rules to ensure that the house would always win. The end result was a denial of due process.

III.

In seeking refunds of the tax overpayments, the affected taxpayers looked primarily to MINN. STAT. § 276.19 (1997), which provides:

> If an overpayment of property taxes arises on a parcel of land for any reason, the responsible county official *shall promptly notify* the payer by regular mail that the overpayment has occurred. The notice must state that amount of the overpayment and identify the parcel on which the overpayment occurred. The notice must also

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[9] *See Carpenter v. Shaw*, 280 U.S. 363, 369 (1930) ("a denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment"); *Reich*, 513 U.S. at 114.

> instruct the payer how to claim the overpayment and advise that the overpayment is subject to forfeiture under this section.

MINN. STAT. § 276.19, subd. 1 (emphasis supplied). The plain language of this provision requires that affected taxpayers be notified by the counties and given an opportunity to claim a refund. Before September 1996, Hennepin County apparently agreed with this analysis, because it prepared and processed several "Notice of Property Tax Overpayment" forms to refund the overpayments. R.A. at 105-6, 115-21. Only when presented with more than 60 applications for overpayment refunds on the same day did the county decide that the overpayment statute was no longer applicable; instead, it argued that the one-year statute of limitations in § 278.01 precluded the refunds.

After the affected taxpayers successfully sued for refunds in the district courts in each county, Hennepin and Dakota Counties appealed. The Minnesota Court of Appeals held that although the one-year statute of limitations contained in § 278.01 hampered any relief through operation of § 276.19, the affected taxpayers could recover in equity in the face of two Minnesota counties indisputably misleading taxpayers into overpaying property taxes. The Minnesota Supreme Court reversed, however, finding a supposed constitutionally sufficient predeprivation remedy in the assessment protest process.[10]

That holding, however, is deeply flawed. Indeed, a longstanding Minnesota case, *Wheeler v. Bd. of Comm'rs of Hennepin County*, 87 Minn. 243 (1902), demonstrates that the affected taxpayers should have been granted a refund of the overpayments. In facts eerily similar to the case at hand, the

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[10] As noted by Justice Stringer in his dissent, this result is an "application of the strict statute of limitations set forth in section 278.01 to claims the section was not intended to extinguish." App. at 23-24a.

auditor for Hennepin County overstated the amount of tax due on a statement provided to the taxpayer. The Minnesota Supreme Court held that the taxpayer could seek a refund for "money had and received" since he was entitled "to rely upon the implied assertion that the full amount alleged was actually due, and necessary to be paid." *Id.* at 244. *Wheeler* has been relied on by Minnesota taxpayers and courts for a century, has never been questioned, and the dissent below found it dispositive in this case.[11]

Nevertheless, the Minnesota Supreme Court facilely held that the only option for refund available was using the assessment challenge statute to contest the legality of the taxes billed. In doing so, the court resisted the plain reading of the statute and denied taxpayers due process. The court also disregarded two key factors. First, as the court itself acknowledged, there is no way a taxpayer could have known that the county applied an incorrect class rate from any information provided by the counties. Second, the deadline for initiating a claim under the assessment protest statute is March 31st, the same deadline for mailing out the tax bills. In other words, the Minnesota Supreme Court adopted a statute of limitations that will in almost all cases bar recovery even before the cause of action arises. This is the very antithesis of due process, a caricature of good tax administration that compels review and reversal by the Court.

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[11] The affected taxpayers right to recover property tax overpayments pursuant to *Wheeler* cannot have been abrogated by the subsequent enactment of MINN. STAT. § 278.01 years later in 1935, since the Minnesota Constitution includes a clause that prohibits the legislature from eliminating vested common law remedies. MINN. CONST. ART. I, § 8. Therefore, even assuming the legislature intended to make § 278.01 the exclusive remedy for property tax overpayments, it could not prevent the affected taxpayers from obtaining a remedy under common law, *i.e.*, *Wheeler*.

In *McKesson Corp v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 45-46 (1990), this Court stated that to satisfy the requirements of due process, the State must provide an aggrieved taxpayer either with a predeprivation hearing (without placing the taxpayer seeking such a hearing under duress)[12] or with "meaningful backward-looking relief." 496 U.S. at 31. In other words, "a State need not provide [a] predeprivation process for the exaction of taxes." *Id.* at 37 (footnote omitted). To be meaningful—and constitutionally sufficient—however, the taxpayer's remedy must be "clear and certain." *Id.* at 39 (quoting *Atchison, T. & S.F.R. Co. v. O'Connor*, 223 U.S. 280, 285 (1912) (Holmes, J.)).

On its face, Minnesota's statutory scheme comports with the procedural requirements enunciated in *McKesson* by providing what seemed to be a "clear and certain" refund procedure. This case is before the Court, however, because the court below vitiated that remedy, finding first that the overpayment statute was inapposite and further that Minnesota law provided a constitutionally sufficient predeprivation remedy, to wit: the assessment protest statute, which had never before been extended to cover the nondiscretionary act of calculating tax bills. That the assessment protest procedure was the exclusive predeprivation remedy in this case, however, was not announced until after a group of affected taxpayers applied for refunds *en masse*, since never before had the counties required taxpayers to file a § 278.01 protest to claim such refunds.

Even assuming that the assessment protest procedure would accommodate the errors of county officials charged with administering Minnesota's property tax statutes, can

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[12] The Court explained that "when a tax is paid in order to avoid financial sanctions or a seizure of real or personal property, the tax is paid under 'duress' in the sense that the State has not provided a fair and meaningful predeprivation procedure." 496 U.S. at 38 n.21.

such a patchwork—concocted by the State several years after the taxes were paid—satisfy the requirement that the taxpayer's remedy be "clear and certain"? To pose the question is to answer it. The purpose of the Due Process Clause is to protect individual rights against arbitrary action by the government, but what is more arbitrary than inventing and interposing new requirements after the time for satisfying those requirements has passed? At best, the exclusivity of the assessment protest statute for any refund of real property taxes was a remote possibility when the affected taxpayers overpaid their taxes; at worst, it was conjured out of thin air long after the fact.

In *Reich*, the Court held that a State may not "reconfigure its scheme, in midcourse"—to "bait" taxpayers into believing that a refund remedy exists, only to "switch" later by claiming its inapplicability. This is because stealth remedies—playing "gotcha" with taxpayers—are not consonant with due process. States may not lull taxpayers into paying a tax, certainly not mislead them into doing so—believing that a "clear and certain" post-deprivation remedy exists—only to declare after those taxes have been paid that no such remedy exists. *See* 513 U.S. at 111. The Minnesota Supreme Court's refusal to order a refund in this case is precisely the type of "mischievous consequences" that the Court warned of more than 130 years ago in confirming the application of the Supremacy Clause to this Court's decisions. *The Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 253 (1867).

Stated bluntly, Minnesota here endeavors to shoehorn the affected taxpayers into a refund scheme that, by its very terms, will deny them relief. The court below parsed Minnesota's property tax statutes and analyzed them, not in search of principle or justice, but a loophole. The Minnesota Supreme Court's ruling emasculates this Court's mandates in

McKesson, Reich, and *Newsweek*—it renders them hollow.[13] And it did so in the context of improper billing by government officials under circumstances that gave taxpayers no reasonable alternative. That the action of the court below might pass muster under federal due process principles beggars the imagination.[14] In *Reich*, this Court refused to permit "bait and switch" tactics by the State of Georgia. How much more appropriate for it to invoke the same rationale here, where taxpayers have been cozened by their local governments? This Court should grant a writ of certiorari and reverse the decision of the Minnesota Supreme Court.

IV.

This Court is properly loath to impinge on the state courts' prerogative to fashion remedies. *See Nat'l Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 586 (1995) ("principles of federalism and comity generally counsel that courts should adopt a hands-off approach with respect to state tax administration"). *Reich* stands for the proposition, however, that the States' remedial discretion is not unfettered, especially where that discretion has been repeatedly abused or where it is improperly exercised in circumstances where, as in this case, the Minnesota Supreme Court has chosen to look the other way at what it euphemistically describes as "bureaucratic errors." App. at

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[13] *McKesson, Reich*, and *Newsweek* are not even mentioned in the opinion below; the Minnesota Supreme Court instead relies on an 1895 case, *Winona & St. Peter Land Co. v. Minnesota*, 159 U.S. 526 (1895), as this Court's most relevant expression of due process requirements in state taxation cases.

[14] *See McKesson*, 496 U.S. at 39 (if a tax is beyond the State's power to impose, the State has no choice but to "undo" the unlawful deprivation by making refunds "because allowing the State to 'collect these unlawful taxes by coercive means and not incur any obligation to pay them back . . . would be in contravention of the Fourteenth Amendment.'" (*quoting Ward v. Bd. of Comm'rs of Love County*, 253 U.S. 17, 24 (1920)).

23a. History is irrefutable: In the past two decades, State after State has distended this Court's holdings—on the merits, on the retroactivity question, and now on the issue of remedies—in order to eviscerate the protections accorded taxpayers by the Constitution.

Two centuries ago, the Framers recognized the need for the federal courts to vigilantly safeguard rights against the parochialism of the States. In The *Federalist No. 80*, Alexander Hamilton used the example of claims to land under grants of different States to underscore the need for diversity jurisdiction:

> The courts of neither of the granting states could be expected to be unbiased. The laws may have even prejudged the question, and tied the courts down to decisions in favour of the grants of the state to which they belonged. And even where this had not been done, it would be natural that the judges, as men, should feel a strong predilection to the claims of their own government.

THE FEDERALIST NO. 80 (Alexander Hamilton), *reprinted in* II THE DEBATE ON THE CONSTITUTION 476, 479-80 (Library of America 1993). Justice Story elaborated in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347 (1816):

> The constitution has presumed (whether rightly or wrongly we do not inquire), that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice.

To be sure, the insularity of the States has generally tempered over the years, and the concerns that led to the development of diversity jurisdiction are not wholly present here. Nevertheless, the principle remains the same. The Court "cannot leave to the States the formulation of the authoritative laws, rules, and *remedies designed to protect people from infractions by the States of federally guaranteed rights*." *Chapman v. California*, 386 U.S. 18, 21 (1967)

(emphasis added). *See* William J. Quirk & C. Rhett Shaver, *Does Congress Put Federalism at Risk When it Limits the States' Power to Tax?*, 166 State Tax Today 27 (Aug. 27, 2001).

The States should not be permitted to thwart the judgments of this Court by creating one excuse after another for refusing to return to taxpayers what the States had no right to take in the first instance. Unless the Court mandates meaningful relief—the immediate refund of the unlawfully collected taxes—the States will continue to have an incentive to creatively interpret their statutes to deny relief for taxpayers deprived of their property—to "roll the dice" with the constitutional rights of taxpayers, knowing that, at worst, they may have to mend their ways in the future.

In the final analysis, this case is about more than the affected taxpayers' entitlement to the tax dollars that Hennepin and Dakota Counties had no authority to extract from them. It is about the legitimacy and vitality of this Court's decisions. It is time for this Court to say that enough is enough. It is time to reject the States' beguiling interpretations of state law, distended readings of the Constitution, and facile efforts to vitiate this Court's mandates. It is time to halt their efforts to treat taxpayers' constitutional rights as unwelcome guests at a dinner party, thinking that if they simply ignore them, they will go away. It is time to say, once again—and to demonstrate by the force of its decision—"[t]he time for toleration has come to an end." *Griffith v. Kentucky*, 479 U.S. at 323 (quoting *United States v. Johnson*, 457 U.S. 537, 555-56 n.16 (1982)).

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari, reverse the decision of the Supreme Court of Minnesota, and order the Counties to refund the taxes they unlawfully collected from the Petitioners.

Respectfully submitted,

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